

Exhibit 26

Page 1

1
2 UNITED STATES DISTRICT COURT
3 EASTERN DISTRICT OF NEW YORK
4 INDEX NO. 10 Civ 1245 (LDW) (ETB)

5 - - - - -x

6 ANTHONY BAFFO,

7 Plaintiff,

8 -against-

9 NEW YORK INSTITUTE OF TECHNOLOGY, ROBERT
10 RIZZUTO, in his official and individual
capacities, and LEONARD AUBREY, in his
official and individual capacities,

11 Defendants.
12

13 - - - - -x

14
15 85 Fifth Avenue
New York, New York

16
17 June 22, 2011
18 10:10 a.m.
19

20 DEPOSITION of STEPHEN KLOEPFER, a
21 Non-Party Witness in the above-entitled
22 action, held at the above time and place,
23 taken before Jennifer Brennan, a Notary
24 Public of the State of New York, pursuant
25 to Subpoena.

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<p style="text-align: right;">Page 2</p> <p>1 2 APPEARANCES: 3 THOMPSON WIGDOR & GILLY, LLP Attorneys for Plaintiff 4 85 Fifth Avenue Fifth Floor 5 New York, New York 10003 6 BY: MATTHEW D. GORMAN, ESQ. BASIL SITARAS, ESQ. 7 NICOLETTE VAIRO, INTERN 8 9 FULBRIGHT & JAWORSKI, LLP Attorneys for Defendants 666 Fifth Avenue 10 New York, New York 10103 11 BY: NEIL G. SPARBER, ESQ. 12 * * * 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">Page 4</p> <p>1 2 STEPHEN KLOEPFER, the 3 Witness herein, having first been duly 4 sworn by the Notary Public, was examined 5 and testified as follows: 6 EXAMINATION BY 7 MR. GORMAN: 8 Q Good morning, my name is Matt 9 Gorman, from the law firm Thompson Wigdor 10 and Gilly. With me is my colleague, 11 Basil Sitaras. And as you know, we 12 represent the plaintiff, Anthony Baffo, 13 in this case against New York Institute 14 of Technology, as well as Robert Rizzuto 15 and Len Aubrey. 16 I asked you here this morning 17 to answer a couple of questions regarding 18 his claims. And first I want to go 19 through a couple general instructions. I 20 assume you're familiar with these, but I 21 want to go through them anyway. 22 You realize that today you are 23 testifying under oath? 24 A I do. 25 Q If you could just wait, I</p>
<p style="text-align: right;">Page 3</p> <p>1 2 STIPULATIONS 3 IT IS HEREBY STIPULATED AND AGREED, by 4 and among counsel for the respective 5 parties hereto, that the filing, sealing 6 and certification of the within 7 deposition shall be and the same are 8 hereby waived; 9 IT IS FURTHER STIPULATED AND AGREED 10 that all objections, except as to form of 11 the question, shall be reserved to the 12 time of the trial; 13 IT IS FURTHER STIPULATED AND AGREED 14 that the within deposition may be signed 15 before any Notary Public with the same 16 force and effect as if signed and sworn 17 to before the Court. 18 * * * 19 20 21 22 23 24 25</p>	<p style="text-align: right;">Page 5</p> <p>1 S. Kloepper 2 understand that many times you're going 3 to know exactly where I'm going with the 4 question, but so the court reporter is 5 able to get everything and the record is 6 clear -- 7 A That's fine. 8 Q -- wait to answer until I 9 finish my question. Thank you. 10 Going along with that, we have 11 a court reporter here and she'll be 12 recording your testimony, so it's 13 important that all of your answers are 14 verbal. No uh-huh, no nods of the head, 15 yes or no answers, something concrete. 16 Do you understand that? 17 A I understand. 18 Q If you don't hear or understand 19 the question, please let me know and I'll 20 repeat it. 21 Do you understand? 22 A I do. 23 Q If I use a term you do not 24 understand, please tell me immediately 25 and I'll try to rephrase it. Same goes</p>

2 (Pages 2 - 5)

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<p style="text-align: right;">Page 126</p> <p>1 S. Kloepper</p> <p>2 this reorganization.</p> <p>3 Q And posting a job description</p> <p>4 doesn't fall into the auspices of</p> <p>5 thinking about hiring?</p> <p>6 A It does, but you have to work</p> <p>7 in an HR department to understand how</p> <p>8 complicated it can be. But it is the</p> <p>9 truth, that not having a director of HR,</p> <p>10 slowed down the resolution of this matter</p> <p>11 or the execution of this matter, plus</p> <p>12 many of the other issues on Kloepper</p> <p>13 Exhibit 5 because I, as general counsel,</p> <p>14 wanted to be sure that the HR component</p> <p>15 of these decisions was fully in play,</p> <p>16 which I cannot be sure until the new</p> <p>17 director of HR showed up.</p> <p>18 Q And if this was a</p> <p>19 reorganization that Mr. Aubrey now wanted</p> <p>20 done ASAP and had been contemplating for</p> <p>21 sometime and presumably would have wanted</p> <p>22 it done during that time, you would</p> <p>23 rather to have him wait throughout the</p> <p>24 entirety of that time, until a new HR</p> <p>25 director --</p>	<p style="text-align: right;">Page 128</p> <p>1 S. Kloepper</p> <p>2 Mr. Aubrey wait throughout the entire</p> <p>3 summer until an HR director was hired to</p> <p>4 implement a plan that he wanted to</p> <p>5 implement since that time?</p> <p>6 A No, it may well have been</p> <p>7 Mr. Aubrey's preference as well, to have</p> <p>8 a director of HR in place, to give him</p> <p>9 comfort that this reorganization was done</p> <p>10 properly.</p> <p>11 Q So it's possible that</p> <p>12 Mr. Aubrey and yourself were not</p> <p>13 comfortable with the people in HR, the</p> <p>14 six or seven employees handling this</p> <p>15 reorganization?</p> <p>16 A I didn't say that either. The</p> <p>17 answer to that is no. What I am saying</p> <p>18 is those things that could wait for the</p> <p>19 new director of HR because the</p> <p>20 responsible manager in this case,</p> <p>21 Mr. Aubrey, was satisfied with it</p> <p>22 waiting, wait. Now, if Mr. Aubrey came</p> <p>23 to me to general counsel and said, Steve,</p> <p>24 I don't care, this thing has to be done</p> <p>25 in August or September, we would have</p>
<p style="text-align: right;">Page 127</p> <p>1 S. Kloepper</p> <p>2 A I didn't say that.</p> <p>3 Q Could you wait until I finish</p> <p>4 my question.</p> <p>5 A I'll do that, but then you need</p> <p>6 to ask more precise questions that don't</p> <p>7 seek to put words in my mouth. I'll do</p> <p>8 that, if you reciprocate.</p> <p>9 Q It's a question, you can say</p> <p>10 yes or no and you need to let me finish</p> <p>11 in order to get to the end of the</p> <p>12 question.</p> <p>13 A Read back the question, will</p> <p>14 you please?</p> <p>15 Q I'm not trying to put words in</p> <p>16 your mouth.</p> <p>17 A Ma'am, could you read back the</p> <p>18 question and I'll give a monosyllabic</p> <p>19 answer to the question.</p> <p>20 Q I wasn't finished with the</p> <p>21 question.</p> <p>22 A Can you try to make the</p> <p>23 question fewer than 50 words, that would</p> <p>24 be helpful.</p> <p>25 Q Would you rather have had</p>	<p style="text-align: right;">Page 129</p> <p>1 S. Kloepper</p> <p>2 found a way to get it done in August or</p> <p>3 September. He did not do that.</p> <p>4 However, he knew, of course,</p> <p>5 that the new director of HR was in place.</p> <p>6 And now he wanted it done and we got it</p> <p>7 done as quickly as we could. But the</p> <p>8 fact that the new general -- the new</p> <p>9 director of HR was in place, was a reason</p> <p>10 that now it needed to get done</p> <p>11 immediately because we didn't have the</p> <p>12 reason anymore that we don't have a</p> <p>13 director of HR.</p> <p>14 Q So it only became something to</p> <p>15 be done ASAP, once Ms. Jablonsky was</p> <p>16 hired?</p> <p>17 A No, I didn't say that either.</p> <p>18 What I'm saying, Mr. Aubrey, knowing</p> <p>19 there was a new director of HR in place,</p> <p>20 wanted it done ASAP, which we did.</p> <p>21 Q Do you believe he wanted it</p> <p>22 done ASAP because Ms. Jablonsky was</p> <p>23 hired?</p> <p>24 A No, I believe he wanted it done</p> <p>25 because he wants decisions implemented.</p>

33 (Pages 126 - 129)

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<p style="text-align: right;">Page 138</p> <p>1 S. Kloepper</p> <p>2 during the October 20th meeting?</p> <p>3 A Yes, and also it may have been</p> <p>4 that Mr. Aubrey had mentioned that to me,</p> <p>5 I just don't remember. But certainly Ms.</p> <p>6 Jablonsky would have -- my knowledge of</p> <p>7 when the reorg was contemplated, would</p> <p>8 have come from Ms. Jablonsky or</p> <p>9 Mr. Rizzuto or Mr. Aubrey. I just don't</p> <p>10 remember.</p> <p>11 Q Did either Ms. Jablonsky or</p> <p>12 Mr. Aubrey, whoever you first heard this</p> <p>13 from, did they tell you what steps had</p> <p>14 been taken since early August, up until</p> <p>15 October 20th, if it was Ms. Jablonsky</p> <p>16 that you learned it from?</p> <p>17 A I did learn, I believe in that</p> <p>18 meeting, that there had been a couple</p> <p>19 steps taken, in terms of posting job</p> <p>20 descriptions and posting new positions</p> <p>21 that were part of the reorg, that I</p> <p>22 learned on or about this time because the</p> <p>23 reorg, I understood, involved not only</p> <p>24 the elimination of Mr. Baffo's function</p> <p>25 and position, but the hire of two</p>	<p style="text-align: right;">Page 140</p> <p>1 S. Kloepper</p> <p>2 It wasn't my place, nor did I need to</p> <p>3 know every job and title of who was going</p> <p>4 to go where.</p> <p>5 Q That was my question, at that</p> <p>6 time, did you have any understanding as</p> <p>7 to whether or not those two new employees</p> <p>8 were sought only as part of this</p> <p>9 reorganization?</p> <p>10 A I didn't have an understanding,</p> <p>11 nor would it have been material for me,</p> <p>12 frankly.</p> <p>13 Q You mentioned that Ms.</p> <p>14 Jablonsky -- you mentioned that you were,</p> <p>15 on October 20th, correct me if I am</p> <p>16 wrong, but during that October 20th</p> <p>17 meeting, you were functioning to make</p> <p>18 sure that the termination was legal under</p> <p>19 state and federal laws; correct?</p> <p>20 A Once I learned that a job</p> <p>21 function employee would be terminated, my</p> <p>22 advice to my client managers was legal</p> <p>23 advice, in my opinion.</p> <p>24 However, not all of the</p> <p>25 discussions I had with Ms. Jablonsky</p>
<p style="text-align: right;">Page 139</p> <p>1 S. Kloepper</p> <p>2 additional persons at lower salaries,</p> <p>3 plus the assumption by Mr. Redlich and</p> <p>4 Mr. Rizzuto of additional</p> <p>5 responsibilities formerly held by Mr.</p> <p>6 Baffo.</p> <p>7 Q So it was your impression that</p> <p>8 the job descriptions in the two new</p> <p>9 positions, these two new employees were</p> <p>10 going to be hired only as part of the</p> <p>11 reorganization?</p> <p>12 A That's not what I said.</p> <p>13 Q I'm asking if that was your</p> <p>14 impression.</p> <p>15 A I didn't really have a settled</p> <p>16 impression. I was asked on the basis of</p> <p>17 Mr. Baffo's job performance and the</p> <p>18 reasons for the reorg for my advice on</p> <p>19 whether the reorg could be, you know, was</p> <p>20 lawful under New York State, city and</p> <p>21 federal law and I didn't need to know all</p> <p>22 of the ancillary details.</p> <p>23 The focus was really on Mr.</p> <p>24 Baffo's job performance and on the</p> <p>25 business reasons for the reorganization.</p>	<p style="text-align: right;">Page 141</p> <p>1 S. Kloepper</p> <p>2 between then and the 23rd of October,</p> <p>3 were legal in nature. One of them being,</p> <p>4 I'm sure you'll get into this, what would</p> <p>5 be fair to Mr. Baffo now that we have</p> <p>6 learned on or after the 23rd of October,</p> <p>7 what would be fair in terms of a</p> <p>8 severance offer, which I don't claim to</p> <p>9 be legal advice, but much of the -- the</p> <p>10 advice about whether the termination,</p> <p>11 whether this reorg was a reorg or some</p> <p>12 pretext for discrimination, that's a</p> <p>13 legal question and I was acting in my</p> <p>14 capacity as general counsel in advising</p> <p>15 that.</p> <p>16 Q And is it your testimony that</p> <p>17 that's why Ms. Jablonsky wanted to meet</p> <p>18 with you on October 20th?</p> <p>19 A She would have known presumably</p> <p>20 at that time, that having met with</p> <p>21 Mr. Rizzuto and Mr. Aubrey about that a</p> <p>22 termination was in the offering and being</p> <p>23 the effective HR director she is, she</p> <p>24 would have known that that would have an</p> <p>25 implication for general counsel.</p>

36 (Pages 138 - 141)

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<p style="text-align: right;">Page 178</p> <p>1 S. Kloepper</p> <p>2 The e-mail is dated</p> <p>3 October 23rd and it's from Carol</p> <p>4 Jablonsky to yourself?</p> <p>5 A Yes.</p> <p>6 Q Do you recall receiving this</p> <p>7 e-mail?</p> <p>8 A Yes.</p> <p>9 Q Now, earlier that day on the</p> <p>10 23rd, did you speak with Ms. Jablonsky?</p> <p>11 A Yes.</p> <p>12 Q What was the subject of that</p> <p>13 conversation?</p> <p>14 MR. SPARBER: In accordance to</p> <p>15 what I said earlier today and I</p> <p>16 haven't objected to anything, I think</p> <p>17 that it's NYIT's position that at</p> <p>18 some point on October 23, 2009, that</p> <p>19 Mr. Kloepper's role changed and that</p> <p>20 at some point on the morning of</p> <p>21 October 23rd, Mr. Kloepper, in my</p> <p>22 words, put on his general counsel hat</p> <p>23 and began to dispense legal advice</p> <p>24 with respect to Mr. Baffo and the</p> <p>25 situation.</p>	<p style="text-align: right;">Page 180</p> <p>1 S. Kloepper</p> <p>2 any indication as to when Mr. Rizzuto had</p> <p>3 called her or spoken with her that</p> <p>4 morning?</p> <p>5 A I don't remember. She may</p> <p>6 have, but my firm memory is that before</p> <p>7 Ms. Jablonsky came up, literally walked</p> <p>8 up to my office that morning, she had</p> <p>9 talked that morning with Mr. Rizzuto.</p> <p>10 Q And when she first came up to</p> <p>11 your office between 8:30 and 9:00 a.m.</p> <p>12 that morning, did she give you any</p> <p>13 indication as to when Mr. Baffo had</p> <p>14 spoken with Mr. Rizzuto earlier that</p> <p>15 morning?</p> <p>16 A I was told by Ms. Jablonsky and</p> <p>17 later by Mr. Rizzuto, that the morning of</p> <p>18 Friday, October 23rd, Mr. Baffo had told</p> <p>19 Mr. Rizzuto that Mr. Baffo was HIV</p> <p>20 positive.</p> <p>21 Q And it's your recollection that</p> <p>22 this would have occurred sometime before</p> <p>23 8:30 on the 23rd?</p> <p>24 A I got to work between 8:30 and</p> <p>25 9 typically. I don't know precisely when</p>
<p style="text-align: right;">Page 179</p> <p>1 S. Kloepper</p> <p>2 And so to the extent you're</p> <p>3 asking for conversations between him</p> <p>4 and Ms. Jablonsky, I'm cautioning the</p> <p>5 witness not to answer with respect to</p> <p>6 any legal advice that he may have</p> <p>7 dispensed.</p> <p>8 I don't know what the answer to</p> <p>9 your question is because he could</p> <p>10 have said, do you want to go to lunch</p> <p>11 or something, which of course he can</p> <p>12 answer, but I'm not sure of the</p> <p>13 answer to your question. And I'm</p> <p>14 cautioning the witness, if it calls</p> <p>15 for dispensing of legal advice, I</p> <p>16 would instruct him not to answer.</p> <p>17 A I'll do my best with those</p> <p>18 guidelines. Ms. Jablonsky came up to see</p> <p>19 me between 8:30 and 9:00 a.m. is my best</p> <p>20 recollection, on Friday, October 23rd and</p> <p>21 told me that Mr. Rizzuto had just that</p> <p>22 morning told her that Mr. Baffo had just</p> <p>23 that morning told Mr. Rizzuto that Mr.</p> <p>24 Baffo was HIV positive.</p> <p>25 Q And did Ms. Jablonsky give you</p>	<p style="text-align: right;">Page 181</p> <p>1 S. Kloepper</p> <p>2 Carol Jablonsky came to see me. I do</p> <p>3 know she was preparing -- the plan had</p> <p>4 been to announce this event to Mr. Baffo</p> <p>5 at 10:00 a.m. that morning and I don't</p> <p>6 know when she came to see me.</p> <p>7 But I believe it was between --</p> <p>8 8:30 and 9:30 on Friday morning,</p> <p>9 October 23rd is my best recollection and</p> <p>10 therefore, she would have been told that</p> <p>11 by Mr. Rizzuto before whenever she told</p> <p>12 me. That's the best I can remember.</p> <p>13 Q And when she came up to your</p> <p>14 office -- strike that.</p> <p>15 What was the reason she gave</p> <p>16 you for coming up to your office?</p> <p>17 A Because she had learned that</p> <p>18 morning an entirely new piece of</p> <p>19 information, namely, that Mr. Baffo was</p> <p>20 claiming as of that morning, the 23rd of</p> <p>21 October, that he was HIV positive and</p> <p>22 that was a relevant piece of information</p> <p>23 for the general counsel to know and also</p> <p>24 both in my guise as general counsel and</p> <p>25 as the supervisor of HR.</p>

46 (Pages 178 - 181)

<p style="text-align: right;">Page 182</p> <p>1 S. Klopfer</p> <p>2 So that's a piece of</p> <p>3 information that I would have expected</p> <p>4 the director of HR to tell me</p> <p>5 immediately, especially since it was only</p> <p>6 received an hour before we were slated to</p> <p>7 eliminate the said employee, Mr. Baffo.</p> <p>8 Q Did Ms. Jablonsky express to</p> <p>9 you that she believed it was a relevant</p> <p>10 piece of information for you to know?</p> <p>11 A I don't recall, but it was</p> <p>12 clearly a relevant piece of information.</p> <p>13 She's an experienced Human Resources</p> <p>14 director. As you will know, HIV status</p> <p>15 is a disability under New York and other</p> <p>16 relevant law and that was -- it goes</p> <p>17 without saying that that piece of</p> <p>18 information, learned literally within an</p> <p>19 hour of terminating someone, is a</p> <p>20 relevant piece of information that should</p> <p>21 be and was shared with the general</p> <p>22 counsel.</p> <p>23 Q And when she came up to your</p> <p>24 office that morning, was that the first</p> <p>25 time you had spoken with her that morning</p>	<p style="text-align: right;">Page 184</p> <p>1 S. Klopfer</p> <p>2 say "from an HR perspective," what do you</p> <p>3 mean?</p> <p>4 A I mean from the decent</p> <p>5 operation of an organization, that it was</p> <p>6 not appropriate to go forward with the</p> <p>7 termination literally an hour after</p> <p>8 learning that the employee was infected</p> <p>9 with HIV virus. I believe that, she</p> <p>10 believed that and we agreed entirely on</p> <p>11 that.</p> <p>12 Q When you say "from an HR</p> <p>13 perspective," you are differentiating</p> <p>14 from a legal perspective?</p> <p>15 A Yes, I am. I'm talking about</p> <p>16 HR, the function of a Human Resources</p> <p>17 Department is to help create a happy and</p> <p>18 productive and fair workplace, that's</p> <p>19 what you want the HR folks to do and at</p> <p>20 which Carol Jablonsky is very good at.</p> <p>21 And this is not a legal consideration</p> <p>22 whatsoever. This is how do you treat</p> <p>23 people at the workplace, even if you have</p> <p>24 already determined for good and</p> <p>25 sufficient reasons that their jobs would</p>
<p style="text-align: right;">Page 183</p> <p>1 S. Klopfer</p> <p>2 when she came up?</p> <p>3 A I believe it was, yes.</p> <p>4 Q Did she have --</p> <p>5 A She was either at deSeversky</p> <p>6 that morning or she was called early at</p> <p>7 her office from deSeversky by</p> <p>8 Mr. Rizzuto. But the reason she was up</p> <p>9 in my office, was Mr. Rizzuto's</p> <p>10 conversation with her about what Mr.</p> <p>11 Baffo had just told Mr. Rizzuto.</p> <p>12 Q At that time she came up to</p> <p>13 your office, did she express to you any</p> <p>14 recommendation as to whether or not the</p> <p>15 termination should go forward that</p> <p>16 morning?</p> <p>17 A I agreed with her from an HR</p> <p>18 perspective, that it would not be</p> <p>19 appropriate to institute a termination of</p> <p>20 employee an hour after being told by the</p> <p>21 employee that the employee was HIV</p> <p>22 positive. Neither one of us thought that</p> <p>23 that was humane, fair or appropriate.</p> <p>24 Q I believe you answered my</p> <p>25 question, but just so I'm clear, when you</p>	<p style="text-align: right;">Page 185</p> <p>1 S. Klopfer</p> <p>2 be eliminated or they would be</p> <p>3 terminated, that there is a certain</p> <p>4 standard of decency one lends to and</p> <p>5 aspires to perform and so it's in that</p> <p>6 sense that I mean HR.</p> <p>7 Q And was this part of the</p> <p>8 conversation you had with Ms. Jablonsky</p> <p>9 that morning, this trying to do the fair</p> <p>10 and right thing regarding the</p> <p>11 termination?</p> <p>12 A Yes, it's not been handed to</p> <p>13 me, but we -- I had approved an earlier</p> <p>14 severance package for Mr. Baffo, that was</p> <p>15 not as generous as the one that is</p> <p>16 attached to Klopfer Exhibit 9.</p> <p>17 The severance offer to Mr.</p> <p>18 Baffo that is attached to Klopfer</p> <p>19 Exhibit 9, was enhanced because even</p> <p>20 though we were entirely comfortable with</p> <p>21 the legal and other reasons -- we were</p> <p>22 entirely comfortable with the lawfulness</p> <p>23 of our actions with respect to Mr. Baffo,</p> <p>24 we empathized with his plight and</p> <p>25 therefore, we offered him additional</p>

47 (Pages 182 - 185)

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